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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-1465

RAYMOND K. PROCUNIER, Director,
California Department of Corrections, et al.,
Appellants,

VS.

ROBERT MARTINEZ, et al.,
Appellees.

On Appeal from the United States District Court
for the Northern District of California

APPELLANTS' BRIEF

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APPELLANTS' BRIEF

OPINION BELOW

The opinion of the three-judge panel of the United States District Court for the Northern District of California (Exhibit A to the Jurisdictional Statement filed herein), is reported at 354 F.Supp. 1092.

JURISDICTION

The judgment of the three-judge panel was entered on February 2, 1973. Notice of appeal was filed on

March 1, 1973. The appeal was docketed on April 28, 1973. This court noted probable jurisdiction on June 18, 1973. The jurisdiction of the Supreme Court to review the judgment of the court below on direct appeal is conferred by Title 28, United States Code, section 1253.

QUESTIONS PRESENTED

1. Did the district court err in refusing to abstain from determining the constitutional validity of administrative rules promulgated by appellant, the Director of the California Department of Corrections, when the regulations themselves were challenged as being vague and had not been interpreted by the state courts and when there existed a state statute, also uninterpreted, dealing with the subject matter covered by the regulations?

2. Did the district court err by using a faulty test to find the mail regulations void?

3. Does the federal Constitution compel the State of California to give "full time lay employees" of attorneys and law students the full range of privileges accorded to attorneys and state licensed investigators in their meetings with inmates?

STATUTES INVOLVED

This case involves the application of the First, Fifth and Fourteenth Amendments to the Constitution, California Penal Code section 2600, Rules 1201, 1205(d)

and (f), and 2402(8) of the Defendant Procunier, Director of the California Department of Corrections, and Rule MV-IV-02 of the Director's Mail and Visiting Manual. These constitutional provisions, the statute and the Director's Regulations are reprinted as exhibits to this brief.

STATEMENT

Plaintiffs, on behalf of themselves and all other inmates at California penal institutions under the jurisdiction of the California Department of Corrections, filed an amended complaint in the United States District Court for the Northern District of California on July 6, 1972, challenging the constitutionality of certain regulations promulgated by Director Procunier (App. pp. 1-15). The amended complaint requested the convening of a three-judge court under the provisions of Title 28, United States Code, section 2281. This request was granted by Chief Judge Chambers of the Court of Appeals for the Ninth Circuit. Defendants then moved to dismiss the complaint under Rule 12(b) of the Federal Rules of Civil Procedure (App. pp. 16-17). Plaintiffs moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (App. pp. 93-95). The motions were heard jointly and, on February 2, 1973, the court issued an order denying the defendants' motion to dismiss the complaint and partially granting the plaintiffs' motion for summary judgment (354 F.Supp. 1092). This order enjoined enforcement of

the above-mentioned regulations and directed defendants to formulate new regulations in their stead, subject to approval by the court, in accordance with the guidance furnished in the court's opinion.

Following the presentation to the court by defendants of proposed regulations in accordance with the opinion and counterproposals by plaintiffs, the court issued a further order on May 30, 1973, regarding the proposed regulations (App. pp. 159-167). Further proposed regulations were submitted by plaintiffs and were approved by the district court on July 20, 1973.

SUMMARY OF ARGUMENT

The district court erred in failing to abstain from deciding the constitutional issues raised concerning inmates' social mail. These regulations, which were challenged as "vague", have not been construed by the state courts. They are fairly subject to an interpretation which would avoid or modify the federal constitutional questions. Further, there is a state statute, as yet uninterpreted, dealing with this subject. Thus, allowing the state courts to pass on plaintiffs' claim may well avoid or modify the constitutional questions. Federal abstention is particularly appropriate because the issues affect a vital state interest, the administration of its prisons. The entire area is one which the courts have been reluctant to enter due to the needs of prison administrators to have wide discretion in the performance of their duties.

We ask this Court to reject the standard adopted by the district court and instead to hold that federal district courts should not set aside state prison regulations unless they lack support in any rational and constitutionally acceptable prison system.

The district court erred in the manner in which it applied its standards to the social mail regulations. Particularly, where there is a lawful right to read a document, there is a commensurate right to copy and preserve it for a legitimate custodial objective.

The district court also erred in determining that the Constitution compels the states to accord to a broad class of persons other than attorneys or state licensed investigators the full range of privileges accorded attorneys in their meetings with inmates. In reaching this conclusion, the court measured the "extent of the restriction against the need for restriction" to determine "due process reasonability". This test may well be appropriate when state prison administrators are formulating a regulation, but it is clearly improper as a standard of constitutional adjudication.

ARGUMENT

I

THE DISTRICT COURT SHOULD HAVE ABSTAINED FROM DECIDING THE CONSTITUTIONAL ISSUES REGARDING THE VALIDITY OF THE DIRECTOR'S MAIL REGULATIONS.

This aspect of the case deals with the control of prison inmates' social mail. The regulations at issue have not yet been interpreted by a state court. In

addition, there is a state statute, also uninterpreted as to this issue, which in pertinent part provides:

"This section shall be construed so as not to deprive [an inmate] of the following civil rights, in accordance with the laws of this state:

. . . (4) To purchase, receive, and read any and all newspapers, periodicals, and books accepted for distribution by the United States Post Office. Pursuant to the provisions of this section, prison authorities shall have the authority to exclude obscene publications or writings, and mail containing information concerning where, how, or from whom such matter may be obtained; and any matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence; and any matter concerning gambling or a lottery."

We asked the district court to abstain. The court declined to do so.

Since the application of the doctrine of abstention almost certainly involves some delay and some duplication of effort, this Court has held that the doctrine should be applied only in those "special circumstances" where these negative factors are outweighed by the benefits to be gained from application of the doctrine.¹ Thus, this Court has recognized on numerous occasions that federal court abstention is mandated in

¹The doctrine of abstention is to be distinguished from the requirement of exhaustion of state remedies, *Preiser v. Rodriguez*, U.S., 36 L.Ed.2d 439, 443, 93 S.Ct. 1827, 1830 (1973), and the operation of the Federal Anti-injunction statute *Mitchum v. Foster*, 407 U.S. 225 (1972).

order that needless constitutional decisions be avoided and that possible federal-state frictions be kept to a practical minimum. *Reetz v. Bozanich*, 397 U.S. 82, 86-87 (1970).²

The district court, in declining to abstain, relied on *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971). In that case this Court found that abstention would be improper because the state law at issue was not uncertain or ambiguous. 400 U.S. at 438-439. The only question presented, uncomplicated by an unresolved question of state law, was whether the statute was constitutional on its face. This Court decided that it was unconstitutional.

Similarly, in *Zwickler v. Koota*, 389 U.S. 241 (1967), another of the cases cited by the district court, this Court found federal abstention to be improper. The statute in that case was conceded to be clear and precise. It was also conceded that state court construction could not narrow its scope. *Id.* at 250. In reaching its decision, this Court, citing *United States v. Livingston*, 179 F.Supp. 9, 12-13 (E.D. S.C. 1959), affirmed *sub nom. Livingston v. United States*, 364 U.S. 281 (1960) held that:

“Though never interpreted by a state court, if a state statute is not fairly subject to an inter-

²The availability of a readily accessible and meaningful state remedy is a prerequisite to the application of the doctrine of abstention. *Spector Motor Co., v. McLaughlin*, 323 U.S. 101 (1944); *Chicago v. Fieldcrest Dairies*, 316 U.S. 168 (1942). California provides such a remedy. *In re Jordan*, 7 Cal.3d 930, 103 Cal.Rptr. 849 (1972); *In re Van Geldern*, 5 Cal.3d 832, 97 Cal.Rptr. 698 (1971); *In re Harrell*, 2 Cal.3d 675, 87 Cal.Rptr. 504 (1970).

pretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit.'” *Id.* at 251.

As the “special circumstances” required for application of the doctrine of abstention were not present because the statute was “not fairly subject” to an interpretation which would avoid or modify the federal question, the Court held that the district court erred in refusing to consider the constitutional issues.

Thus, “special circumstances” exist where the state statute or regulation under attack is itself ambiguous and thus fairly subject to a construction by the state courts which may avoid or modify the federal constitutional question, *Fornaris v. Ridge Tool Company*, 400 U.S. 41 (1970); *Harman v. Forssentus*, 380 U.S. 528, 534 (1965). In *Lake Carriers’ Assn. v. MacMullan*, 406 U.S. 498 (1972), the Court spoke of the “paradigm” case for abstention as being one where “the challenged state statute is susceptible of ‘a construction by the state courts that would avoid or modify the [federal] constitutional question.’” *Id.* at 510-511 (citations omitted).

In our case, we have regulations which the district court characterized as vague. If so, it would seem that they should be readily susceptible to state interpretation which would avoid or modify the federal question. The very statement by the district court that the regulations are vague constitutes a compelling

reason for abstention. The district court erred in not abstaining.

There is a separate and distinct reason why federal abstention is appropriate. In *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), the case in which the doctrine of abstention was first articulated, the Court found that abstention was proper because the order of the Texas Railroad Commission, which was under attack as offending constitutional mandate, in fact rested upon the authority of a Texas statute. It was not clear whether the statute authorized the Commission's order. The Court held the Texas courts should have the "last word" on the interpretation of their own state statute [*Id.* at 499-500], pointing out that a decision by the Texas courts that the Commission's order was unauthorized by the statute would have ended the litigation without the necessity to resolve the claimed constitutional issue. Thus, the lower federal court should have abstained.

Similarly, in *Reetz v. Bozanich*, 397 U.S. 82 (1970), this Court held that the federal district court, which had declared certain laws and regulations of the State of Alaska unconstitutional, should have abstained. Since the Constitution of the State of Alaska contained provisions, as yet uninterpreted by the Alaskan courts, which would perhaps have altered or resolved the federal constitutional questions, and since the statute and regulations related to a matter of great state concern, the Court held that the district court should have directed the parties to repair to the

Alaskan courts for a resolution of the state constitutional issues.

This Court noted that:

"The *Pullman* doctrine was based on 'the avoidance of needless friction' between federal pronouncements and state policies. The instant case is the classic case in that tradition, for here the nub of the whole controversy may be the state constitution." *Id.* at 87 (citations omitted).

It is noted that we are not now concerned with the statute or regulations being attacked but with the effect on that statute or regulation of yet another state statute, the application of which might well avoid or modify the federal question. This second statute may or may not be itself ambiguous.

In our case, at all times here pertinent there existed in California, in addition to the regulations under attack, a statute dealing in some detail with the effect of a sentence of imprisonment in a state prison on the civil rights of a prisoner (Cal. Pen. Code §2600). We submit that this statute might well be interpreted by the California State Courts so as to avoid or modify the federal constitutional question.

The existence of the state statute is particularly telling and is best exemplified by the district court's dismissal of count two. In that count, the plaintiffs challenged the Director's Rules regarding inmate-attorney mail on the ground that they were unconstitutional. Before the district court could reach the constitutional question, the California Supreme Court

decided in *In re Jordan*, 7 Cal.3d 930, 103 Cal.Rptr. 849 (1972), that these Director's Rules conflicted with Penal Code section 2600 and California Evidence Code provisions regarding confidential communications between an attorney and his client. The district court then dismissed count two on the ground that the confidential mail constitutional issue had been rendered moot by the *Jordan* decision (354 F.Supp. at 1095). Can we not also say it is not unlikely that interpretation by the state court of the California statute as regards social mail could well moot the social mail issue also?

Our case is, we submit, not only remarkably similar to the *Pullman* and *Reetz* cases, *supra*, it is also the "paradigm" case spoken of in *Lake Carriers*, *supra*. The regulations in question were attacked as being vague (App. p. 4). They have not been construed by the state courts. Definitive construction of them by the state courts may well narrow their sweep so as to avoid or materially alter the plaintiffs' constitutional objections. See *Fornaris v. Ridge Tool Co.*, *supra*. Not only this, the operation of the statute as opposed to the regulation might well avoid or modify the federal constitutional question.

In applying both branches of the federal abstention doctrine, the courts have always considered the nature of the state interest involved. Thus, if a "vital state interest" is at issue, federal district courts should to quick to abstain. *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593, 594 (1968) [water rights in New Mexico]; *Toomer v. Witsell*, 334 U.S. 385, 392

(1948) [collection of state taxes]; *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) [complex state administrative law plan]. This Court recently had occasion to comment upon the states' interest in the administration of their prisons:

"It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State. Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of these problems." *Preiser v. Rodriguez*, U.S., 36 L.Ed.2d 439, 451-452 (1973).

It is submitted that the state does indeed have a vital interest in the operation of its prisons.

Yet another factor indicating the propriety of federal abstention is the fact that the entire field of prison administration is one in which the courts have been reluctant to interfere, both because of their own

lack of expertise in the field of rehabilitation and because of the recognized need for prison administrators to be possessed of a fairly wide discretion in the day-to-day discharge of their duties. See *McCloskey v. Maryland*, 337 F.2d 72, 74 (4th Cir. 1964). It must be remembered that in California the Director of Corrections promulgates general policy and guidelines in the form of state-wide rules and regulations. Individual institutions are expected to formulate specific rules covering their special needs. Regulations appropriate to high security institutions such as Folsom and San Quentin may well be inappropriate to mountain conservation centers [Procurier Deposition, App. pp. 49, 55]. In addition, institutional advisors are expected to attempt to relate the rules to the particular needs of the individual [Procurier Deposition, App. p. 49]. In short, if the punishment is not to fit the crime but rather the custody fit the individual, the courts should be most reluctant to hedge an administrator's discretion in a thicket of constitutional provision.

"Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances." *Preiser v. Rodriguez*, supra, 36 L.Ed. 2d 439, 452 (1973).

In summary, we submit that federal abstention is proper in cases where a state enactment, as yet unin-

terpreted by the state courts, is challenged as being vague and thus interpretation of it by the state courts may avoid the federal constitutional question. Even if the enactment directly challenged is not vague, abstention is proper if resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law contained in another state statute. In this case, the Director's Regulations, as yet uninterpreted by the California courts, are challenged as being vague. Also, there exists a California statute (Penal Code section 2600), as yet uninterpreted by the courts, dealing with the rights of prisoners with regard to mail. These considerations mandate federal abstention, especially since the area of prison administration is of vital state interest and since the courts have, in any event, been reluctant to interfere in this area due to the recognized need for prison administrators to be possessed of fairly wide discretion in the day-to-day performance of their duties. These considerations, we submit, together present the "paradigm" case for federal abstention.

II

THE DISTRICT COURT ERRED IN ITS CHOICE OF A STANDARD FOR ASSESSMENT OF THE CHALLENGED REGULATIONS RELATING TO THE CONTROL OF INMATES' PERSONAL MAIL BUT, REGARDLESS OF THE STANDARD, THE REGULATIONS ARE NOT CONSTITUTIONALLY INFIRM.

A. The court erred in its choice of a standard.

We begin this argument by delineating that which is *not* involved in the instant case. An inmate's right of confidential correspondence with his attorney or with a court is not at issue. Nor is his right to correspond confidentially with holders of public office. These rights are guaranteed by California Penal Code section 2600, as interpreted in *In re Jordan, supra*. Similarly, an inmate's right to send confidential letters to the Governor of the State of California and to the administrative heads of the state or federal agencies or boards responsible for his custody and release are not at issue. See *In re Jordan, supra*, at 932-933, 103 Cal.Rptr. at 850. At issue is the extent to which a federal court may intervene in matters of internal prison management to protect asserted First Amendment rights of inmates relating to their social mail.

It is now held that a prisoner does not shed all his First Amendment rights at the prison gates. *Brown v. Peyton*, 437 F.2d 1228, 1230 (4th Cir. 1971). However, it is equally clear that "... [l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a restriction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948);

see *Lanza v. New York*, 370 U.S. 139, 143 (1962).
Indeed:

"Imprisoned felons and inmates of such institutions . . . cannot enjoy many of the liberties, the rights and the privileges of free men. They cannot go abroad or mount the housetops to speak. They are subjected to rigid physical limitations and to disciplinary controls which find no shred of justification in any other context. Even the disciplinary powers of military authorities are not so absolute." *McCloskey v. Maryland*, 337 F.2d 72, 74 (4th Cir. 1964); cited with approval in *Seattle-Tacoma Newspaper Guild, et al. v. Parker, et al.*, _____ F.2d _____ (No. 72-2330) (9th Cir. 1973).

More particularly, it is generally recognized that inspection of inmate social correspondence and restrictions on its extent and character by prison officials are inherent incidents in the conduct of penal institutions. *Lee v. Takash*, 352 F.2d 970, 971 (8th Cir. 1965). To the same effect see *Stroud v. United States*, 251 U.S. 15 (1919); *Wilkerson v. Warden*, 465 F.2d 956 (10th Cir. 1972); *Sostre v. McGinnis*, 442 F.2d 178, 199-201 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049, and 405 U.S. 978; *Burns v. Swenson*, 430 F.2d 771 (8th Cir. 1970); *McCloskey v. Maryland*, 337 F.2d 72 (4th Cir. 1964); *Adams v. Ellis*, 197 F.2d 483 (5th Cir. 1952); *Leeper v. Birzgalis*, 314 F.Supp. 808 (W.D. Mich. 1969); *Argentine v. McGinnis*, 311 F.Supp. 134 (S.D. N.Y. 1969); *Holland v. Beto*, 309 F.Supp. 784 (S.D. Tex. 1970); *Foster v. Jacob*, 297 F.Supp. 299 (C.D. Cal. 1969).

Two cases have, however, gone so far as to hold that the states have no justifiable interest in reading outgoing prisoner mail. *Guajardo v. McAdams*, 349 F.Supp. 211 (S.D. Tex. 1972);³ *Morales v. Schmidt*, 340 F.Supp. 544 (W.D. Wis. 1972).⁴ The district court herein did not rest its holding on such broad grounds. The district court held that any prison regulation or practice which restricts the right of free expression which the prisoner would have enjoyed had he not been imprisoned must be judged by one of two standards: (1) whether it is related both reasonably and necessarily to some justifiable purpose of imprisonment (see, e.g., *Carothers v. Follette*, 314 F.Supp. 1014, 1024 (S.D. N.Y. 1970)), or (2) whether it advances a "compelling" state interest. (See, e.g., *Fortune Society v. McGinnis*, 319 F.Supp. 901 (S.D. N.Y. 1970).) *Id.* at 1096. The court found that it was unnecessary for it to choose between these possible standards since it concluded that the regulations in question failed whichever be applied.

We submit that the court overlooked the proper test to be applied in such a case. This test is whether the regulation "lacks support in any rational and constitutionally acceptable concept of a prison system." *Seattle-Tacoma Newspaper Guild v. Parker*, *supra*; *Sostre v. McGinnis*, *supra*, at 199-200. Thus, in

³The Court of Appeals for the Fifth Circuit granted a hearing en banc in this case on May 14, 1973 (476 F.2d 1285).

⁴It is noted that this case was reversed by the Court of Appeals for the Seventh Circuit. *Morales v. Schmidt*, _____ F.2d _____ (12 Crim.L.Rptr. 2378, Jan. 17, 1973). This decision in turn is being reconsidered en banc.

Morales v. Schmidt, F.2d, 12 Crim.L.Rptr. 2378 (7th Cir. 1973),⁵ the court held that the proper test is whether "the action contemplated bears a rational relationship to or is reasonably necessary for the advancement of a justifiable purpose of the State", such as rehabilitation of the inmate. Indeed, one circuit court has used the standard of whether the regulations at issue are "unjustified and unreasonable with respect to the needs of prison restraint and discipline". *Wilson v. Prasse*, 463 F.2d 109 (3rd Cir. 1972).

This "rational and constitutionally acceptable" standard is premised on the fact that the administration of the state prisons is primarily a state function and that federal courts should refuse to interfere with this state function in all but the most extreme cases of shocking deprivation of fundamental rights. *Baldwin v. Smith*, 446 F.2d 1043 (1st Cir. 1971). It is also based on the fact that the relation between inmates and the prison administrators is substantially different from the corresponding climate and relationships in the world outside the prison walls. *Preiser v. Rodriguez*, U.S., 36 L.Ed.2d 439, 451-452 (1973); *Seattle-Tacoma Newspaper Guild v. Parker*, *supra*. Indeed, constitutional limitations on governmental actions differ depending on the role in which government is acting. Thus, withdrawal or limitation of certain privileges generally taken for granted by the majority of free men may be justified by consider-

⁵See footnote 4, *supra*.

ations underlying the correctional system, *Price v. Johnston*, *supra*, and an inmate's rights with reference to social correspondence are something fundamentally different than those enjoyed by his free brother.

Prison administrators are entrusted with a broad responsibility toward their charges in that their duty is not only the maintenance of order and good discipline within the prison but also the rehabilitation to the extent possible of the persons entrusted to their care. Because of this relationship they need flexibility and wide discretion in the day-to-day discharge of their duties. See, *e.g.*, *Smith v. Schneckloth*, 414 F.2d 680 (9th Cir. 1969). Therefore, the validity of limitations on these rights must be tested with this distinction in mind also.

Of course, order and good discipline must be maintained within the prisons. Inroads on the basic First Amendment rights also arise from this inescapable fact of prison life. Tensions and the proximity of prisoners to their fellows and to their custodians militate against the application of the First Amendment standards applicable to the general population. See *Knuckles v. Prasse*, 302 F.Supp. 1036, 1056-1057 (E.D. Pa. 1969), *affirmed*, 435 F.2d 1255 (3d Cir. 1970), *cert. denied*, 403 U.S. 936, *rehearing denied*, 404 U.S. 877. A prison yard lacks a leavening of substantial citizens. Thus, that which may be within the ambit of protected speech if shouted by a zealot to homeward bound commuters in Grand Central Station at 5:30 p.m. might well, in the tense and charged at-

mosphere of a prison, lead to violence or disruption. Indeed, *Wilson v. Prasse*, 463 F.2d 109 (3d Cir. 1972), holds that the standard by which regulations are to be tested is are they "unjustified and unreasonable with respect to prison restraints and discipline?"

Nor are inmates in California prisons divorced from the outside world. As long as inmates are allowed unlimited confidential communication with attorneys, courts, the administrative agency heads responsible for their treatment and their legislators, they are afforded ample protection against possible excesses by correctional staff, as well as a privileged safety valve. Although certain of the phrases in the Director's Regulations arguably offend the First Amendment principles applicable to a free man in a free environment, we submit that, given the status of a prison inmate, his singular relationship with the prison administrators, the compelling need for the maintenance of order and discipline within the prison, and the volatility of the prison environment, the challenged regulations are well above the test of whether they lack "support in any rational and constitutionally acceptable concept of a prison system."

B. The regulations in question are not constitutionally infirm, regardless of the standard used.

Even reading the challenged regulations in light of the "reasonable and necessary" test,⁶ it does not ap-

⁶We note that the test is stated in other cases as whether the rule "bears a reasonable relationship to or is reasonably necessary" for the advancement of a justifiable state purpose. *Morales v. Schmidt*, *supra*, F.2d (7th Cir. 1973), but see note 4, *supra*.

pear that they constitute unjustifiable or unnecessary restrictions on a prisoner's right of expression. In Rule D-2402(8), prohibition of letters pertaining to criminal activity is clearly proper. The prohibition of "lewd" or "obscene" letters is also proper since these terms are synonymous and obscene matter is not accorded First Amendment protection. *Miller v. California*, U.S., 41 U.S.L.W. 4925, 4927 (1973). The prohibitions against "defamatory" matter, and against matter "otherwise inappropriate" to the purposes of rehabilitative social correspondence are within the discretion of the prison administrators. The ban on the inclusion of "foreign matter" in envelopes supposedly containing only letters also does not violate any right. This is routinely done in the case of air mail letters.

Director's Rule 1205(d), which defines contraband in part as "any writings or voice recordings expressing inflammatory political, racial, religious or other views or beliefs, when not in the immediate possession of the originator, or when the originator's possession is used to subvert prison discipline by display or circulation" is not invalid on its face. Such matter clearly presents a danger to prison security and may properly be controlled or prohibited. We note that in *Beauharnais v. Illinois*, 343 U.S. 250 (1952), the Court upheld a conviction under an Illinois statute banning public display of matter portraying the "depravity [or] criminality . . . of any race . . . or religion" and exposing them to contempt or derision

“or which is productive of breach of the peace or riots”.

Rule 1205(f), which defines as contraband “any writing or voice recordings constituting escape plans or plans for the production or acquisition of explosives or arms, possession of which is forbidden by law to inmates” is plainly neither unreasonable nor unnecessary.

The last paragraph of Rule 1205 deals with matter not defined as contraband and which, therefore, may not be the subject of disciplinary proceedings. Such matter, if it tends to subvert prison order and discipline, may be stored as “inmate’s property” and he may have access to it under supervision [Procunier Deposition, App. p. 57]. This regulation, we submit, places no restriction on an inmate’s First Amendment rights to communicate with the free world. It simply recognizes a category of material which used unwisely in the charged prison atmosphere could present a danger to both order and rehabilitation.

Rule 1201 is directed toward matter which is of legitimate concern to the prison administration. Agitation, magnification of grievances, undue complaining and behavior which might lead to violence are all matters which may be subjected to regulation both as a precaution against flash riots and in the furtherance of inmate rehabilitation.

Finally, the lower court’s order is imprecise in that it fails to distinguish between the various purposes served by the regulations and instead places a whole-

sale prohibition on their enforcement for any purpose. These several purposes of the regulations deserve and must be given varying and individual consideration. The court found that improper correspondence could be (a) rejected for mailing, (b) the subject of a disciplinary report or (c) photocopied and placed in the inmate's file. 354 F.Supp. at 1095-1096. Though recognizing these three differing results, nevertheless the district court ordered that the same test of impropriety be applied in every case. We submit that this is error. We perceive no constitutional barrier to the copying of inmate's social mail lawfully read by correctional officers. See *Hayes v. United States*, 367 F.2d 216 (10th Cir. 1966) (where such material was used in a criminal trial). The purpose of this mail is to assist in the process of rehabilitation.⁷ Since the mail itself may be read, it may be copied. And if it may be copied, placing a copy of it in an inmate's file is not a giant's step. Such mail is a valuable tool in gauging progress toward rehabilitation. Regulations which might not survive constitutional tests if used to reject mail would be valid if used to gauge the progress of rehabilitation. Considerations which might justify rejection of a letter might well not justify the taking of disciplinary action. The court, however, failed to make any of these distinctions.

⁷"Correspondence with members of an inmate's family, close friends, associates and organizations is beneficial to the morale of all confined persons and may form the basis for good adjustment in the institution and the community." Association of State Correctional Administrators—August 23, 1972—*Uniform Standards for Guidance of Institutional Administrators and Personnel*.

For all these reasons, we submit that the district court erred in enjoining enforcement of the defendant Director's Regulations regarding inmate "social" mail and we submit that the district court be mandated to re-examine its rulings in the light of the proper constitutional standard.

III

THE CONSTITUTION DOES NOT COMPEL THE STATES TO ACCORD NON-ATTORNEYS THE RIGHT TO CONFER CONFIDENTIALLY WITH PRISON INMATES.

The district court enjoined enforcement of a prison rule limiting attorney's visiting privileges to no more than two investigators so designated by the inmate's attorney, and who must themselves be either state licensed investigators or members of the bar. Appellants were ordered to replace this rule with one which was "less restrictive" and were advised by the district court that "bona fide law students under the supervision of attorneys, or full time lay employees of attorneys" would constitute a reasonable group of "investigators". 354 F.Supp. at 1099. In an attempt to comply with the court's order, the defendants opened the class of investigators to include law students certified under the California State Bar rules for the practical training of law students (App. pp. 140-141). The court rejected this proposal, holding that "defendants' failure to include paraprofessionals constitutes an unreasonable restriction on inmates' right of access to the courts" (App. p. 165) and order-

ing a regulation defining the term "paraprofessionals" as "persons regularly employed by the attorney of record to do legal and quasi-legal research on a full-time basis" (App. p. 166).

The basis for the court's decision appears to be that the rule in question violates inmates' right of reasonable access to the courts. It is clear that the courts, state or federal, have no general obligation to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief. *Johnson v. Avery*, 393 U.S. 483, 488 (1969). The practice in most federal courts is to appoint counsel in post-conviction proceedings only after a petition for post-conviction relief passes initial judicial evaluation and the court determines that an evidentiary hearing is warranted. *Id.* at 487. Similarly, no general right exists for the appointment of counsel to represent an indigent in a civil case. 28 U.S.C. §1915; *United States ex rel. Gardner v. Madden*, 352 F.2d 792 (9th Cir. 1965). However, it has long been recognized that prisoners, as well as other persons, have a right of reasonable access to the courts. *Ex parte Hull*, 312 U.S. 546, 549 (1941).

The district court relied upon a California case, *In re Harrell*, 2 Cal.3d 675, 87 Cal.Rptr. 504 (1970), which "measured the *extent* of the restriction against the *need* for restriction" in considering the reasonableness of prison regulations and cited three factors:

1. The extent to which access to the courts is impeded or discouraged.

2. How undesirable is the conduct sought to be prevented from the viewpoint of legitimate custodial objectives?

3. Are there reasonable alternative means which do not entail so significant a restriction?

The district court first found on the basis of an affidavit that prison visits are so time consuming to attorneys that they are reluctant to undertake them⁸ and reasoned that the time would be better spent on the not always consistent objectives of:

1. Providing better legal assistance to present inmate clients.

2. Representing additional inmate clients.

Thus, the district court reasoned, access to the courts is substantially impaired. The district court then conceded that there was a threat to prison security but finally found that this interest could be served by the less restrictive means of permitting law students and paraprofessionals to have attorney privileges. The fact that experimental law school sponsored programs arranged on an individual basis between certain institutions and selected law schools permitted some law students to enter prisons with attorney's privileges [Procunier's Deposition, App. p. 68], apparently mandated that all law students must be permitted entry

⁸We may note that though San Quentin Prison and Folsom Prison are distant from the office of the attorney in question, they are near to San Rafael and Sacramento respectively, where attorneys are both active and activist.

and this entry, in turn, demanded that other paraprofessionals⁹ be afforded the same privilege.

Neither this brief nor affidavits on summary judgment are the time and place to settle the paraprofessional debate which still rages in many states. See generally, Brickman, *Expansion of the Lawyering Process Through a New Legal System: The Emergence and State of Legal Paraprofessionalism*, 71 Colum.L.Rev. 1153 (1971); Smith, *Vertical Expansion of the Legal Services Team*, 56 A.B.A.J. 664 (1970). The propriety of the use of law students for inmate legal assistance is perhaps more generally accepted. The appellants most strongly submit, however, that it is bordering on the absurd to find a federal court holding these groups as a matter of constitutional compulsion must be given an attorney's special privileges when visiting a state prison. Even were we to concede that under *Harrell* principles it is better practice to permit this kind of privilege, does it follow that the constitution compels it?

We submit that the district court's opinion creates a new constitutional right in the inmate. This "right" compels the states to subordinate valid prison security requirements to the fashioning of new methods which would assertedly improve preexisting means of access to the courts. If a better, which is defined as less restrictive, means can be found, it must be used. Thus,

⁹Later defined as "persons regularly employed by the attorney of record to do legal and quasi-legal research on a full-time basis" (App. p. 166). We note that these classes are *not* coterminous and that designation by attorneys of "investigators" without more, has caused problems [Procunier Deposition, App. p. 63].

no matter what the method used by the prison authorities to refrain from unnecessary interference with inmates' access to the courts, if a "better" or "more reasonable" method can be found, the existing system is constitutionally prohibited. We submit that this notion transforms a federal judge into a prison administrator and gives an inmate most favored nation status. This cannot be. Rather, we submit, the proper duty of the federal court or indeed of any court is to delineate the basic constitutional right and then ask if this federal minimum has been satisfied. If it has, the federal inquiry ends. See, *Hatfield v. Bailleaux*, 290 F.2d 632, 639-640 (9th Cir. 1961). The constitutional question must be not "can it be improved?" but rather "is it arbitrary?"

Reasonable access to the courts has been defined as the "opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and to sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters." *Hatfield v. Bailleaux*, 290 F.2d 632, 637 (9th Cir. 1961). It has also been defined as encompassing "all the means which a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him." *Gilmore v. Lynch*, 319 F.Supp. 105, 110 (N.D. Cal. 1970) (three-judge court), *aff'd sub nom.*, *Younger v. Gilmore*, 404 U.S. 15 (1971).

The rule in question does not deny inmates access to their attorneys. Nor does it impair the confidential relationship between an attorney and his clients. Nor does it attempt to deny attorneys the opportunity to use the services of non-attorneys to aid them in their work. Cases such as *Ex parte Hull*, 312 U.S. 546 (1941), and *Johnson v. Avery*, 393 U.S. 483 (1969), are distinguishable since the state's interests involved therein were minimal and it was clearly shown that enforcement of the prison practice or regulation would effectively bar inmates from presenting their grievances to the courts.

Whatever may be the merits generally of the use of law students and non-student legal assistants or "para-professionals" for the performance of some functions previously performed only by attorneys, surely the federal Constitution does not compel the California state prisons to recognize such persons as attorneys for purposes of allowing them confidential communication with inmates. The classes of attorneys and licensed private investigators, which were recognized by the previous rule, are easily defined and identifiable classes. Both are subject to detailed licensing and regulatory statutes of the State of California. Both have been subject to extensive background checks. Both enjoy a status well worth preserving. Both have much to lose. It is not an arbitrary regulation.

We submit that an inmate's constitutional right of access to the courts does not demand that the legitimate requirements of institutional security be subordinated to the convenience of an attorney, especially

when nothing prohibits that attorney from visiting and conferring with his client. The effect of the state prison regulation on the inmates' right of access to the courts, if any, is only speculative and incidental. The regulation under attack is a good faith effort by a progressive director to facilitate and improve inmate access to the courts above and beyond the limits of constitutional compulsion. It should be upheld.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Dated, August 15, 1973.

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(Exhibits Follow)

Exhibit A

UNITED STATES CONSTITUTION—FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION—FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION— FOURTEENTH AMENDMENT, SECTION ONE

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Exhibit B**CALIFORNIA PENAL CODE**

§2600—Suspension and partial restoration of civil rights; forfeiture of public office or position of trust; continued rights.

A sentence of imprisonment in a state prison for any term suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority, or power during such imprisonment. But the Adult Authority may restore to said person during his imprisonment such civil rights as the authority may deem proper, except the right to act as a trustee, or hold public office or exercise the privilege of an elector or give a general power of attorney.

Between the time of the imposition of a sentence of imprisonment in a state prison for any term and the time the said person commences serving such sentence, the judge who imposed such sentence may restore to said person for said period of time such civil rights as the judge may deem proper, except the right to act as a trustee, or hold public office or exercise the privilege of an elector or give a general power of attorney.

This section shall be construed so as not to deprive such person of the following civil rights, in accordance with the laws of this state:

- (1) To inherit real or personal property.
- (2) To correspond, confidentially, with any member of the State Bar, or holder of public office, pro-

vided that the prison authorities may open and inspect such mail to search for contraband.

(3) To own all written material produced by such person during the period of imprisonment.

(4) To purchase, receive, and read any and all newspapers, periodicals, and books accepted for distribution by the United States Post Office. Pursuant to the provisions of this section, prison authorities shall have the authority to exclude obscene publications or writings, and mail containing information concerning where, how, or from whom such matter may be obtained; and any matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence; and any matter concerning gambling or a lottery. Nothing in this section shall be construed as limiting the right of prison authorities (i) to open and inspect any and all packages received by an inmate and (ii) to establish reasonable restrictions as to the number of newspapers, magazines, and books that the inmate may have in his cell or elsewhere in the prison at one time.

Exhibit C

DIRECTOR'S RULE D-1201

INMATE BEHAVIOR—Always conduct yourself in an orderly manner. Do not fight or take part in horse-play or physical encounters except as part of the regular athletic program. Do not agitate, unduly complain, magnify grievances, or behave in any way which might lead to violence.

DIRECTOR'S RULE D-1205

The following is contraband:

- d. Any writings or voice recordings expressing inflammatory political, racial, religious or other views or beliefs when not in the immediate possession of the originator, or when the originator's possession is used to subvert prison discipline by display or circulation.
- . . .
- f. Any writings or voice recordings constituting escape plans or plans for the production or acquisition of explosives or arms, possession of which is forbidden by law to inmates of institutions under the control of the Department of Corrections. Such material as may be contained in books, magazines, or newspapers which have been previously approved for receipt by inmates is excepted.

Contraband will be confiscated. Possession of contraband is grounds for disciplinary action. A disciplinary committee may turn any contraband over to the Adult Authority, regardless of the outcome of any disciplinary proceedings involving that contraband.

Any writings or voice recordings not defined as contraband under this rule, but which, if circulated among other inmates, would in the judgment of the warden or superintendent tend to subvert prison order or discipline, may be placed in the inmate's property, to which he shall have access under supervision.

DIRECTOR'S RULE 2402(8)

[Inmates] may not send or receive letters that pertain to criminal activity; are lewd, obscene, or defamatory; contain foreign matter, or are otherwise inappropriate.

**DIRECTOR'S MAIL AND VISITING MANUAL
SECTION MV-IV-02**

Investigators for an attorney-of-record will be confined to not more than two. Such investigators must be licensed by the State or must be members of the State Bar. Designation must be made in writing by the attorney.